UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MIKE COATES CONSTRUCTION COMPANY, INC.
Employer

and Case No. 8-RC-16666

OPERATIVE PLASTERERS & CEMENT
MASONS LOCAL 179
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[1]

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *All full-time and regular part-time journeyman, apprentice and trainee cement masons employed by the Employer, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, all cement masons performing work with the following counties/townships in Pennsylvania: Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Cameron, Clarion, Clearfield, Crawford, Elk, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Lawrence, McKean, Mercer, Potter, Somerset, Venango, Warren, Washington, Westmoreland and Halfmoon, Houston, Patton, Rush, Taylor and Worth Townships in Centre County, and all other employees.*

The record indicates there are approximately 9 employees in the unit found appropriate herein.

[1] The Petitioner and Employer filed post-hearing briefs that have been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claim to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. Issues

The Petitioner, Local 179, seeks a unit of cement masons employed by the Employer without geographic limitation. The Employer argues that the unit should be restricted to the three Ohio counties; Mahoning, Trumbull and Columbiana, which coincide with the geographic jurisdiction of its current contract with the Petitioner. In the alternative, the Employer argues that its contract with Bricklayers Union Local Number 9 in western Pennsylvania is a Section 9(a) agreement and that any of its cement masons performing work within the geographic area covered by that agreement should also be excluded from any appropriate unit. The parties also disagree over the voting eligibility of working foreman Ken Plevyak. The Employer contends that he is a supervisor within the meaning of Section 2(11) of the Act. The Petitioner asserts that Plevyak is a lead man who does not possess any indicia of supervisory authority.

II. Decision Summary

I find that the appropriate unit is one without geographic limitations, with one exception. I shall exclude from the unit employees performing work under the Employer's agreement with Bricklayer's Local 9, as that agreement is a Section 9(a) agreement. Accordingly, the Local 9 agreement is a bar to including in the petitioned-for unit those employees performing work under its terms.

I further find that Ken Plevyak is not a supervisor and therefore is eligible to vote in the election directed herein.

III. Background

The Employer is a general contractor based in Niles, Ohio. It employs its own carpenters, bricklayers, laborers and cement masons. It subcontracts out all other work. The record shows that, while the Employer performs most of its cement work in Mahoning and Trumbull counties in Ohio, it also regularly performs such work in other parts of Northern Ohio and Western Pennsylvania.

The Employer asserts that it does not have a core group of cement masons who travel to each of its jobs wherever located. The Employer's president, Mike Coates, testified that the Employer's practice is to secure its cement masons from the local union having geographic jurisdiction over the location where it is performing work. If that local union cannot provide enough employees, the Employer will then secure additional workers from the most convenient source, including other local unions of the Operative Plasterers and Cement Masons union (OP). Whether or not the Employer considers them a "core group", the record evidence shows that it has employed the same cement masons with enough regularity so that as many as nine employees meet the **Steiny/Daniel** formula and would be eligible to vote in the election directed herein.[2]

Work on all the Employer's jobsites is conducted under the direction of one of its job superintendents. Working foreman Plevyak has some oversight responsibility for all the cement finishing work conducted on those jobs.

[2] **Daniel Construction Co., 133 NLRB 264 (1961) and Steiny & Co., 308 NLRB 1323 (1992).**

The Employer has a current contract with the Petitioner, Local 179.[3] It is also party to a contract with International Union of Bricklayers and Allied Craftworkers, BAC Local 9 covering cement masons work performed in western Pennsylvania.[4] While president Coates testified that the Employer has been party to other contracts with other OP locals from time to time, there is no record evidence that it is bound to any such agreements at this time. Coates testified that when working within the geographic jurisdiction of other OP locals, the Employer applies the terms of the applicable agreement, even if the employees are members of other local unions.

IV. Unit Scope

I find a unit without geographic boundaries, limited only to exclude work covered by other Section 9(a) agreements, to be appropriate for several reasons. First, I note that the Petitioner need only seek an appropriate unit, not the most appropriate one. **Overnite Transportation Co., 322 NLRB 723 (1996).** Second, the Board has recently noted in **Premier Plastering, Inc., 342 NLRB No. 111 (2004),** that the basic proposition in making unit determinations in the construction industry is that the proper unit description is one without geographic limitation where a core group of employees work at an employer's various worksites regardless of location.

In the instant case, the Employer argues that it does not have a core group of employees who work on most or all of its jobs. However, as noted above, the record reflects that it has a number of cement masons who have regularly worked on its jobs both within and without the counties where the Petitioner claims jurisdiction. This is not surprising in light of the Employer's acknowledgement that it does not secure all it cement masons from the immediate area where the jobsite is located, but frequently resorts to other sources. Based on the record evidence, these sources obviously include employees from previous jobs. Accordingly, while the Employer may not consider the nine cement masons who appear to meet the **Steiny/Daniels** formula to be a "core" group, the record evidence clearly establishes that these employees have a continuing working relationship with the Employer. Thus, the employees appear to be core employees as that term was used by the Board in **Premier Plastering**.

The Employer notes that the Board in **Premier Plastering, supra,** acknowledges that geographic limitations on bargaining units may be appropriate based on traditional community of interest factors. However, an application of said factors in the instant case does not warrant a different result. First, all the Employer's job sites, regardless of location, are commonly supervised by the same job superintendents. Second, as noted earlier, many of its cement masons work on most of the Employer's jobs, regardless of location. Third, the Employer claims it applies various local OP agreements to its work, depending on job location. However, there is no record evidence that the terms of these agreements vary from one another in any significant way. Therefore, it cannot be said that employees' working conditions vary significantly depending on the location of the job. Accordingly, I am not persuaded that a traditional

[3] I am satisfied that the Local 179 agreement meet the criteria for Section 9(a) contracts set out in **Staunton Fuel & Material, Inc., 335 NLRB No. 59 (2001).**

[4] The Employer is a party to a contract with the Petitioner as a separate signatory to the Petitioner's contract with the Concrete Contractor's Chapter of the Builder Association of Eastern Ohio and Western Pennsylvania effective June 1, 2002 to May 31, 2003. The record also establishes that the Employer is a separate signatory to a contract between BAC Local 9 and a multi-employer association effective August 1, 2003 through May 31, 2013.

community of interest analysis provides any basis for attaching geographic limitations to this bargaining unit.

The Employer further argues that the only appropriate unit must have geographic limits because it generally restricts its search for work to areas within one hour's drive of it Niles, Ohio office. I do not find this argument persuasive. First, the Employer would have me limit the geographic scope of the unit to three counties: Mahoning, Trumbull and Columbiana (the geographic area covered by its current contract with the Petitioner). However, the record clearly establishes that it seeks and performs work outside these counties on a regular basis. Any alternative argument that I should limit the unit to those three counties, plus any additional counties within an hours driving distance of Niles, Ohio is not only speculative but undercut by Coates' testimony regarding numerous jobs the Employer has undertaken, now and in the past, outside that "limit". Coates' admission that "I don't really have a rule", when asked to describe any limits on the Employer's search for work, adds even more uncertainty about the appropriateness of crafting any geographic limits. Trying to describe a bargaining unit in geographic terms, based upon speculation about where this Employer may or may not perform work, would be a nearly impossible task.

Under these circumstances, the Board's pronouncement that units with geographic limitations will normally not be deemed appropriate is applicable to the instant case. **Premier Plastering, supra, slip op. at 2**. There is some mention in **Premier** that the employer in that case did not limit its search for work. However, there is nothing in the decision to indicate that this fact alone was determinative in the Board's finding that only a unit without geographic limits was appropriate. Another important factor in that case was that the employer had a core group of employees that it used on most of its jobs, wherever located. The fact that in the instant case, the Employer uses employees who are members of the Petitioner to supplement those that it hires locally is not a sufficient basis to distinguish the cases in my view.

However, I agree with the Employer's argument that it's contract with BAC Local 9 is a Section 9(a) agreement. It contains the requisite language acknowledging that BAC Local 9 sought recognition based on support of the majority of unit employees, that it provided the employer with evidence of majority support and that the employer extended recognition to the said union based on this evidence. Despite the Petitioner's arguments to the contrary, I find this recognition language sufficient to evidence a Section 9(a) agreement under **Staunton Fuel & Material, Inc., 335 NLRB 717 (2001).** Accordingly, the existence of a current Section 9(a) agreement covering the Employer's cement finishing work performed in western Pennsylvania dictates that the geographic areas in that state covered by said agreement must be excluded from the unit found appropriate. **Premier Plastering, Inc., supra., G.L. Milliken Plastering, 340 NLRB No. 138 (2003).**[5]

V. Supervisory Status of Ken Plevyak

As noted above, Ken Plevyak is employed by the Employer as a working foreman and has some oversight on all cement finishing jobs performed by the Employer. However, the record establishes that this oversight does not involve the exercise of independent discretion. Thus, for example, the number of square feet involved a cement pour determines the number of employees used on the job. Plevyak's superiors make final decisions about scheduling and

[5] The Petitioner is; of course, free to seek certification even though it currently is party to a Section 9(a) contract with the Employer. **General Box. Co., 82 NLRB 678 (1949).**

manning cement finishing jobs. While Coates claimed that Plevyak has the authority to hire employees, there is no record evidence that Plevyak does anything more than call various union halls for referrals and routinely accept the men sent out by the halls. Coates further testified that Plevyak could discipline and terminate employees, but the record evidence reflects only one or two isolated instances where he made a disciplinary recommendation and also indicates some independent investigation by Plevyak's superiors before final action was taken. There is no record evidence that Plevyak assigns overtime or grants employees leave from work.

Pursuant to provisions of the applicable collective bargaining agreement(s), Plevyak receives higher pay than other cement masons. He does not receive any fringe benefits that differ from other employees.

Section 2(11) of the Act defines the term "supervisor" as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment."

The burden of proving supervisory status is on the party who alleges that it exists. **NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861, 1863 (2001).** The exercise of some supervisory authority in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985), aff'd. in relevant part 794 F.2 527 (9th Cir. 1986).**

Based on the above, I have concluded that the Employer has not met its burden of showing that working foremen Plevyak is a supervisor within the meaning of the Act. It is undisputed that most of his work time is spent performing the duties of any other cement mason. His involvement in the routine direction of work is not of the type to confer supervisory status. **North Shore Weeklies, Inc., 317 NLRB 1128 (1995).** As the Supreme Court noted in **Kentucky River, supra**, there is a distinction to be drawn between employees who direct the manner of others' performance of discrete tasks and supervisors who direct other employees. The direction engaged in by Plevyak clearly involves the former. Thus, as noted previously, he does not decide the number of employees necessary to man a job, nor does he decide schedules. While he may have made some recommendations regarding whether to discipline employees, the evidence shows that Coates and the job superintendent conduct an independent investigation before deciding whether to actually discipline that employee. Accordingly, under the circumstances, the input of the working foremen does not constitute the type of effective recommendation that establishes statutory supervisory authority. **Brown & Root, Inc., 314 NLRB 19, 23 (1994).**

As the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in **Daniel Construction Co., 133 NLRB 264 (1961) and Steiny & Co., 308 NLRB 1323 (1992).**

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have note been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by Operative Plasterers and Cement Masons Local 179.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 17, 2004.

DATED at Cleveland, Ohio this 3rd day of November 2004.

/s/ [Frederick J. Calatrello]
Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8